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KEITH EVERTS RODE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEITH EVERTS RODE, Defendant.	Docket No. 5:12cr00888-003 EJD DEFENDANT'S SENTENCING MEMORANDUM Date: July 9, 2015 Time: 1:30 p.m. Hon. Edward J. Davila

I. INTRODUCTION

Pursuant to a Plea Agreement under the provisions of Federal Rule of Criminal Procedure 11(c)(1)(B), Keith Rode entered a plea of guilty to a violation of Title 18 USC 1341, Mail Fraud, a Class C felony. The United States Probation Office has prepared a Presentence Report (PSR) and concluded that the advisory United States Sentencing Guideline (USSG) in this case is Total Offense Level 31, Criminal History Category I. Mr. Rode has no objections to the PSR.

Mr. Rode comes now before the Court requesting that he be sentenced to five years probation, conditioned upon a period of home detention and the payment of restitution. He asks the Court to examine the factors enumerated in Title 18 USC 3553(a) and determine that the requested sentence is sufficient, but not greater than necessary to achieve the statutory sentencing goals. He asks, in particular, that the Court consider his role in this offense, the lack of significant gain to him, his efforts to return funds to the victims, and the enormous collateral consequences he has already and will pay for this transgression. Mr. Rode requests that the Court consider the following information in formulating its sentencing decision.

II. BACKGROUND

Keith Everts Rode was born in Kenosha, Wisconsin, on October 5, 1967. He is the older of two children born to the marriage of Gerry L. Rode and Elberta Misurelli Rode. Gerry Rode is now 70 and resides in Reno, Nevada. Gerry was born and raised in Kenosha and completed two years of college. A businessman throughout his career, he worked for AT&T, owned and operated a heating and air conditioning company in Kenosha, with Keith's maternal uncle owned and operated a saloon in Kenosha, and owned and operated the Harley Davidson Motorcycle Dealership in Santa Barbara, California, for eleven years. The elder Mr. Rode sold his home in Santa Barbara in 2013 as a result of losses he sustained from his over $700,000 in investments in GLR Growth Fund, the object of the present prosecution.

Elberta Rode, now 68, continues to reside in Kenosha in the family home built in 1976. She and Keith's father separated in 1988 and divorced in 1991. A high school graduate, Mrs. Rode married to her husband at age 18 and when he was 20. She obtained the heating and air conditioning company through the divorce. She eventually sold it and then worked in retail sales and as a teacher's aid in an elementary school special education class. Keith's father briefly remarried and divorced, but his mother has never remarried.

Keith has a younger sister, 46 year old Karrie Francois. Karrie graduated from Marquette University and the Wisconsin College of Medicine. She has an obstetrics and gynecology practice in Scottsdale, Arizona. She is married to a school principal and has two children. Karrie is not aware of the present prosecution.

Although born in Kenosha, Keith was raised in nearby Pleasant Prairie, Wisconsin. His father and maternal grandfather built the home in which Keith was raised from age eight until he went off to college. Keith attended parochial schools and graduated from St. Joseph High School in Kenosha in 1986. An excellent student, Keith graduated with a 3.8 GPA, was on the cross country and track teams, and was editor of the school year book.

Keith's father was generally occupied running his businesses and was rarely around. Family vacations were structured around Keith's sister Karrie's competitive ice skating. She achieved national standing and competed all over the United States, including at the National Championships. As "compensation" to Keith, he was allowed to spend portions of the summers with his paternal grandparents in Granada Hills, California.

After high school graduation, Keith entered the University of Wisconsin at Whitewater. He graduated *magna cum laude* with a Bachelor of Business Administration in Accounting Degree in 1990. As he did during high school, Keith worked weekends and summers for his father's heating and air conditioning company, installing both commercial and residential systems.

Keith met Stephanie Martin while both were in high school. Immediately after graduation from collage, they were married in Milwaukee, Wisconsin. They relocated to Los Angeles, where Keith had accepted a position as a junior associate with then Arthur Andersen & Co., a big eight accounting firm. The young couple obtained an apartment near Los Angeles International Airport and two years later purchased a house in Santa Clarita. Keith and Stephanie have two children, 23 year old Alex, presently serving in the United States Army, and 20 year old Sydney, a student and residing in Myrtle Beach, South Carolina.

Keith remained with Arthur Andersen until 1994. He rose to Senior Associate. In 1994, after obtaining his California CPA license, he joined Rose Snyder and Jacobs in Burbank, California, where he remained until 1996. That year, Keith and Stephanie divorced. She moved with the children to Illinois to be nearer her family. Keith remained in Southern California and in 1996 joined KPMG in Woodland Hills as a Tax Managing Director. He worked for KPMG until 2002.

While at KPMG, Keith met Michelle Stang, a divorcee with two children ages 10 and 2.

Her ex-husband was an alcoholic (since deceased) and played no role in raising her two daughters, Ashley and Amanda. Michelle and Keith were married in 1997. Keith formally adopted the girls the following year. Now 28 and 20, Ashley is presently attending mortuary school in Chicago and Amanda is a student at the University of Wisconsin - Milwaukee. Michelle and Keith have three children, 17 year old Ethan, 15 year old Peyton, and 13 year old McKenzie.

Believing that business growth had the greatest potential in the "Silicon Valley," in 2000, KPMG transferred Keith to its Mountain View office as Tax Managing Director. Keith and Michelle bought a home in Prunedale, north of Salinas and Keith commuted. The "tech bubble" burst shortly thereafter. Business suffered. Keith and Michelle made the decision in 2002 to return to Wisconsin, where they bought a home in Muskego. Three years later, they moved into a home they built in Franklin, Wisconsin.

In 2003, Keith joined Clifton Gunderson, which became CliftonLarsonAllen (CLA). He earned a Wisconsin CPA license in 2004 and was promoted to partner and director of the Racine Office. Keith remained with CLA until April, 2012, when he was asked to leave after being interviewed in March of 2012 by FBI agents in connection with this case.

Unable to find work until he accepted a position in November 2012 with Macias, Gini & O'Connell, LLP, in Century City (Los Angeles, California), Keith relocated to Southern California, where he rents a room in Los Angeles, while his family remains in Wisconsin. Macias, Gini & O'Connell is aware of the present prosecution, is fully supportive and have confirmed their desire and intent to maintain him in his current position. (See attached exhibit letter from Kevin O'Connell, managing partner of Macias & O'Connell LLP) In January or 2013, Keith became an independent contractor with the company.

Keith has lost 35 pounds since this investigation was initiated. He otherwise enjoys excellent health and takes no medication. Keith has no history of the use of drugs. His consumption of alcohol was minimal while in college and virtually none since graduating. Keith's only experience with mental health professionals took place in 2010, when he and Michelle attended couples counseling to sort out issues of a "blended family."

The Investigation

According to the PSR and investigators' reports, John Geringer, Christopher Luck, and Keith Rode became friends through a local church in Santa Cruz, California. In 2003, the three combined their respective expertises to form an investment company, Geringer, Luck, and Rode (GLR), and a capital management fund and growth fund. Geringer was licensed to sell insurance and make investments. Luck had business management and marketing/sales experience and Rode was an accountant. Geringer was to be responsible for investments and investor relations. Luck also recruited investors, but also was involved in several start-up companies in which the company invested, and Rode was responsible for preparing tax returns and investor statements based on information provided by Geringer. GLR represented to investors that their investments would be allocated 75% into equities and 25% into direct company investments. Each year, Geringer provided data regarding the fund's performance and investors' gain to Rode, who used that information to prepare tax returns and investor statements. Those annual gains were purported to be between 17% and 25%. Geringer and Luck ran the company out of a Scotts Valley office, while Rode was living and working in Wisconsin and preparing GLR statements and taxes in addition to his full time position in an accounting firm.

In late 2008, Geringer informed Luck and Rode that the company had been unusually successful that year and advised there would be a distribution to each partner of $1,649,338. However, in April 2009, Geringer informed Luck and Rode that the bonuses needed to be returned to the company, so that an investor who demanded her $12 million investment, could have her investment returned. He stated that the fund did not have the liquid assets to meet the demand. Luck and Rode wanted a fuller explanation, at which Geringer admitted that he had been falsifying the company's performance, and that, in fact, the company was losing money. Geringer admitted to provided falsified brokerage trading account statements to Mr. Rode in an attempt to hide these loses and make it appear that his trading activities had yielded substantial profits. Geringer admitted he had given false financial documents to Mr. Rode for several years in an attempt to misrepresent the account balances of the firm. Geringer signed a written confession that he, and he alone, had been lying about the performance of the fund.

Throughout the management of GLR, both Geringer and Luck had been taking substantial salaries and, unbeknownst to the other partners and unauthorized, Luck had been using investor funds amounting to almost $3 million to finance his automobile racing team, which he later claimed to be part of the company's branding or "marketing program". Rode had taken a monthly salary, varying between $2,000-$8,000, prior to the $1.6 million bonus, on which he paid taxes. Mr. Rode immediately returned this bonus to the company to meet the investor demand, the first to do so. Geringer also returned the bonus, however, Luck did not.

Faced with the information from Geringer of the company's option trading failure, the three chose to try to make GLR profitable in order to make all the investors whole through what was expected to be a pretty quick sale of GLR investments. GLR had been investing in three start-up companies, which had, it was thought, potential for great success that had not yet been realized. Part of the false information that had been provided by Geringer was that GLR was adhering to the advertised strategy of 75% equity investment and 25% direct company investment. In fact, virtually all of GLR investment funds, aside from the money paid to Geringer, Luck and the racing program, was invested in the three start-ups. The three partners elected to continue the operation of GLR, including recruiting new investors, in the expectation that the start-ups would yield substantial profits sufficient to repay the investors. Geringer and Luck continued the day-to-day operation of the company, recruiting investors, it has since been determined, using false advertising material and misleading personal representations. Rode continued to be limited to providing investor statements based on information provided by Geringer. From the point of Luck and Rode learning of Geringer's fraudulent statements in late April of 2009 until GLR was investigated, an additional $32.88 million was invested in GLR.

Over the life of GLR, there was an approximate loss of over $50 million, and approximately $30 million was invested in the start-up companies.[1] Of the three start-up companies, two have been sold, one at a loss and the other for a modest gain. The remaining company, Digital Delivery Networks, Inc., continues in operation and owns several patents that based on third-party evaluation have apparent substantial value.

Additional Information

Keith Rode has explained that he met John Geringer and Christopher Luck at the Christian Life Center in Santa Cruz during 2001-2002. At the time, he was living in Prunedale, CA and working as a Tax Managing Director for KPMG Accounting in Mountain View, California. Due to problems in the economy and to be nearer his children from his first marriage, Keith and his family decided to move back to Wisconsin, where he obtained work at an accounting firm. While living in Wisconsin, he was contacted by his friends Geringer and Luck, who wanted to form an investment company and have him do the accounting work for the firm. Keith understood that Geringer was to be responsible for all investments and recruiting investors and Luck would be the business manager and in charge of marketing/sales. Keith was to prepare tax returns and investor statements. Like so many others involved with this case, having met both Geringer and Luck through his church, Keith had no reason to suspect or question their integrity.

Keith obtained permission from his employer in Wisconsin to use the company's software to prepare the tax returns and used Microsoft Excel to produce investor statements for GLR. Geringer sent him the necessary figures for him to prepare the taxes and statements. Keith explained that Geringer was the only partner who had the necessary licenses to invest. Geringer alone had access to the accounts and simply provided Keith the raw figures for each year. From 2003 until 2009, Keith prepared the returns and statements based wholly on the figures Geringer

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1 To this end, defendant Rode joins, adopts and incorporates by reference the loss calculation methods set forth in the sentencing memorandum of co-defendant John Geringer.

provided. At times Geringer and Luck were taking as much as $50,000 per month in compensation, whereas Keith, because of his limited role, took only $2,000. This was justified in that Geringer and Luck were on site and involved full-time daily in doing the bulk of the work for the company. Keith was otherwise employed full-time, devoted only a very small portion of his work time to GLR business, rarely traveled to California, and had virtually no client contact. He did recruit his father and father-in-law, both of whom invested in GLR.

In late 2008, Geringer informed (boasted) Luck and Keith that GLR had a very profitable trading year. Geringer stated that each partner should take a $1.6 million bonus and that GLR should make several substantial contributions to charity, including their church. He also organized a company trip for the partners' families to Hawaii. Keith and his family had never before been on such a trip. Because of his conservative nature, Keith was somewhat upset about the expense. Geringer assured him it was appropriate to celebrate their success. Keith would later be dumbfounded over the lavish spending.

In April 2009, Geringer and Luck arranged a conference phone call for them to meet with Keith. It was during that conference call that Keith learned that Geringer had been falsifying written account statements and that the company had not only not had a banner year in 2008, but that GLR was losing money and had been for some time. Geringer's investments had failed and a substantial amount of money, contrary to the promised diversified investments in equities, had gone instead into three start-up companies. Keith stated upon being told of this, he literally became sick to his stomach. Luck later called back and informed Keith that he had extracted a written confession from Geringer of his misconduct.

In his initial telephone confession, Geringer had told them that an investor had demanded her $12 million investment back and that there were insufficient liquid assets to pay her. He told Luck and Keith that the $1.6 million bonuses had to be returned so that this refund to the investor could be made. Keith had already paid over $600,000 in taxes on the bonus and agreed to immediately return the remaining $1 million, which he did. He understands that

Geringer also repaid his bonus, but that Luck never did.

The three partners next had to decide what to do from that point forward. One option considered was going to law enforcement about Geringer's conduct. However, after much consideration, it was decided the only way to protect the investors' funds was by liquidating, at the first appropriate opportunity, GLR's investments in the start-up companies, which they believed had substantial value - value more than sufficient to make each investor whole. DDNI in particular held several patents which they had been informed and believed would be worth millions. Their strategy, however, depended upon Geringer and Luck continuing to operate GLR in order to shepherd DDNI to the point of sale. Keith was to continue to prepare taxes and investor statements. Based upon what was known about the position and strength of the startups, it was thought that the sale could be accomplished fairly quickly and that the GLR fund could then be terminated upon payment to the individual investors.

Keith admitted that he rationalized his decision to continue with GLR, wanting to try to salvage investor funds and seeing this as the only way to accomplish this goal. He continued to rely on Geringer's figures in preparing the taxes and statements. He stated that he knew that the bulk of GLR assets were in the start-up companies and that he used (as had been the case from the outset) Geringer's suggested "mark-to-market" asset valuing to prepare those statements (the same method was later used by an independent auditor). Keith was from the outset concerned about this policy, even though he recognized it as a legitimate and accepted accounting practice. Because of its potential tax consequences to some individual investors, he did not favor the "mark-to-market" method. He expressed his reservations to Geringer, but he went along with it to pursue the possibility of repaying the investors, which was his goal and priority. The three continued with this strategy for three years, ending in 2012 when the authorities initiated the investigation.

As a result of the investigation, Keith was terminated by his employer in Wisconsin. Almost a year later and after a great deal of searching, he was able to obtain employment with a firm in Los Angeles and is now an independent contractor for the firm, with the very real potential of long-term stable employment there. His family remains in Wisconsin, because of the uncertainty of the future. His wife has now filed for divorce. Keith travels to visit his family every 3-4 weeks. He now lives in a room in a boarding house with several other people.

III. APPLICABLE SENTENCING LAW

The landmark decision in *United States v. Booker*, 160 L. Ed. 2d 621, 125 S.Ct. 738 (2005), changed sentencing in the Federal Courts. *Booker* renders the Guidelines as advisory only, and instructs the sentencing courts to consider the Guidelines in context of all of those factors enumerated in Title 18 USC 3553(a).

> ". . . Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker*, at 660-661.

The Supreme Court addressed the issue of the "presumption of reasonableness" of a within Guidelines sentence in *Rita v. United States*, 551 S.Ct. 338, 127 U.S. 2456, 168 L.Ed. 2d 203 (2007) and instructed that a within Guideline sentence is presumed reasonable only upon **appellate review**. The Court stated:

> "We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. *18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32*. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines, to apply, *USSG § 5K2.0*, perhaps because the Guidelines sentence itself fails properly to reflect *§ 3553(a)* considerations, or perhaps because the case warrants a different sentence regardless. See *Rule 32(f)*. Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. See *Rules 32(f), (h), (i)(1)(C)* and *(i)(1)(D)*, see also *Burns v. United States, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L.Ed. 2d 123 (1991)* (recognizing importance of notice and meaningful opportunity to be heard at sentencing). In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. *Booker, 543 U.S. at 259-260, 125 S.Ct. 738, 160 L. Ed. 2d 621*." at 351.

Further, the Court instructed:

> "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. Even the Government concedes that the appellate courts may not presume that every variance from the advisory Guidelines is unreasonable." at 354.

In *Nelson v. United States*,129 S. Ct. 890, 892, 172 L.Ed. 2d 719 (2009), perhaps as a reminder and definitely for emphasis, the court stated:

> "Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable."

The Ninth Circuit reiterated this premise in *United States v. Edwards*, 595 F.3d 1004, 1015 (9th Cir. 2010) ([Court] cannot presume a sentence is substantively unreasonable only because it falls outside the range recommended by the Sentencing Commission).

Indeed, in *Irizarry v. United States*, 128 S.Ct. 2198, 2202, 171 L.Ed. 2d 28 (2008), the Court ruled that a variance from the sentencing Guideline range did not even require notice to the parties.

The Ninth Circuit was heard on the presumption of reasonableness and directed that even on appeal the presumption of a Guideline sentence may not be reasonable. It stated:

> ". . . A court of appeals may *not* presume that a non-Guidelines sentence is *un*reasonable. Although a court may presume on appeal that a sentence within the Guidelines range is reasonable, *id*, we decline to adopt such a presumption in this circuit." *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc).

The Guideline range is simply the beginning of the analysis for sentencing, not the end. The Ninth Circuit stated:

> "'The Guideline's factor may not be given more or less weight than any other.' So while the Guidelines are the 'starting point and initial benchmark' and must 'be kept in mind throughout the sentencing process,' the Guideline's range constitutes only a touch-stone in the district court's sentencing consideration." *United States v. Autery*, 555 F.3d 864, 8l72 (9th Cir. 2009)

United States v. Ressam, 629 F.3d 793, 828 (9th Cir. 2012) (en banc), defined "substantive reasonableness:"

> "A substantively reasonable sentence is one that is sufficient, but not greater than necessary to accomplish §3553(a)(2)'s sentencing goals. The touchstones of

> 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 USC §3553(a). In determining substantive reasonableness, we are to consider the totality of the circumstances, including the degree of variance for a sentence imposed outside the Guidelines range."

The Court must now consider 18 USC 3553(a) in its entirety and impose a sentence "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." The court, in determining the particular sentence to be imposed, shall consider –

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence imposed --

(a) to reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense;

(b) to afford adequate deterrence to criminal conduct;

(c) to protect the public from further crimes of the defendant; and

(d) to provide the defendant with needed education or vocational training, medical care or other correctional treatment in the most effective manner;

The sentencing court is now required to consider factors that the Guidelines effectively prohibited from consideration (ie: Age, USSG 5H1.1; Education and Vocational Skills, USSG 5H1.2; Mental and Emotional Condition, USSG 5H1.3; Physical Condition Including Drug or Alcohol Dependence, USSG 5H1.4; Employment, USSG 5H1.5; Family Ties and Responsibilities, USSG 5H1.6; Socio-economic Status, USSG 5H1.10; Civic and Military Contributions, USSG 5H1.11; and Lack of Youthful Guidance, USSG 5H1.12.). *United States v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (*en banc*). To consider the "history and characteristics of the defendant," the Court must now consider factors the Guidelines eschewed.

Finally, the Supreme Court has cautioned that respect for the law is promoted in many ways, not always measured by the strictness of sentences or the nature of harsh sanctions. The Court stated:

> ". . . Moreover, the unique facts of Gall's situation provide support for the

> District Judge's conclusion that, in Gall's case, "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall v. United States*, 128 S.Ct. 586, 599, 169 L.Ed. 2d 445 (2007).

The Ninth Circuit has reiterated this notion in *United States v. Edwards*, 595 F.3d 1004, 1016 (9th Cir. 2010), wherein the court concluded that the "fact of a felony conviction," plus probation with appropriate conditions are measures sufficient, but not greater than necessary to achieve the objectives in 3553(a).

In order to meet the mandate of the *Booker* remedy, then, this court must calculate the appropriate guidelines range and may consider appropriate departures. It must also apply the 3553(a) factors and address any other specific characteristics of the defendant or his offense that might impact the determination of a "reasonable" sentence under the particular circumstances of this case. The court must then consider the statutory parsimony provision and impose a sentence "sufficient, but not greater than necessary to comply with the purposes set forth in [§3553(a)(2)."] The district court's sentencing decision will then be subject to an abuse-of-discretion review by the circuit. See, *United States v. Treadwell*, 593 F.3d 990, 999 (9th Cir. 2010) (reversal is appropriate only if district court's sentence is "illogical, implausible, or without support in inferences that may be drawn from facts in the record.").

IV. A SENTENCE SUFFICIENT, BUT NOT GREATER THAN NECESSARY

An analysis of the factors enumerated in 3553(a) indicates that a sentence that is sufficient, but not greater than necessary, *given the particulars of Keith Rode's involvement in this offense*, is a sentence to probation, despite the advisory Guideline range.

Nature and Circumstances of the Offense: There is no doubt about the seriousness of this investment fraud. Many people were victimized and the losses are substantial. However, the vast difference in conduct and culpability between Keith Rode and his co-defendants is almost impossible to overstate. Keith Rode's role in the offense was so strikingly and dramatically less serious than that of his co-defendants as to warrant a striking and dramatic variance from the sentences imposed on his far more blameworthy and culpable co-defendants. It is critically important to a fair analysis to compare and to contrast conduct and intent. Consider the actions that each of the two co-defendants took by repeatedly and calculatingly *exploiting their positions of trust* to both recruit and then continue to defraud new (and old) investors. When we then factor in the extent they each continued to significantly financially benefit from this fraud, the contrast in conduct, intent, and financial benefit between Keith Rode and his co-defendants could not be any more stark.

When GLR was formed, Geringer was responsible for investor recruiting and investments; Luck was responsible for investor recruiting and sales; while Keith Rode was responsible for the preparation of investor statements and fund tax returns. There is no dispute that these individual investor statements were issued based solely on the data given Rode by Geringer. There is no dispute that from the inception of GLR, Keith had no role in how the investors' funds were invested or used, and in his role as accountant, he prepared documents/returns based wholly on the figures provided to him by Geringer. Keith did not become culpable until he and Luck were informed of Geringer's fraudulent actions in the Spring of 2009, wherein he agreed with the plan to try to recover any lost investor funds through what was thought to be the inevitable profitable sale of GLR's investment in DDNI.[2] Particularly then, and as this Court is aware even to this day, there was a legitimate and valid basis to believe that if this investment could be shepherded through to completion, it would yield substantial profits. Even after the 2009 disclosure and the plan to continue GLR, Keith legitimately relied on figures given to him by Geringer and other sources accepting the "mark-to-market" valuation of DDNI.

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[2] While there still exists the continued, if fading, hope that DDNI will be the source of considerable funds to compensate the victims of this case, it must be remembered that at the time of the decision to go forward with this plan, based upon the information known at the time, it was anticipated that this sale of assets was something that would and should happen quickly.

As important, and emblematic of the differing roles of the three defendants, is the allocation of funds to the partners, which was wholly decided by Geringer and Luck. Keith accepted the wide disparity, because he naively believed that Geringer and Luck were "earning" more for the partnership.[3] Geringer and Luck were reaping thousands of dollars monthly, while Keith accepted a modest monthly stipend, quite legitimately earned for the services he provided. Keith was both physically removed from the operation of GLR and financially removed. For the entire life-span of GLR, he lived and worked full-time thousands of miles away. Unlike his co-defendants, GLR occupied no more than a minor role in his time and personal finances. When requested by Geringer to return the 2008 "bonus," Keith promptly did so. Geringer also returned his "bonus," but it appears that Luck refused to do so.

Keith Rode's role in this offense, including his compensation, is VASTLY different from that of his co-defendants. He is, of course, responsible for his actions and fully accepts that responsibility. However, in determining the appropriate sentence in this case, his mitigated role is significant and worthy of a substantial variance from the Guideline range.[4]

History and Characteristics of the Defendant: As the BACKGROUND stated above notes, Keith Rode's life has been characterized by hard work, commitment to family, professional development, and integrity. His involvement with GLR and the offenses that took place therein are completely out of character for him. Until his association with both Geringer and Luck, both of whom he met for a brief time through his church, there was not a blemish on Keith Rode's record. His principle transgression was his capitulation to a plan to make the investors whole, after he was informed of Geringer's falsehoods. Keith acknowledges now that, while he genuinely made this choice with the best of intentions, it was not his choice to make, and the choice he should have made in April 2009 was to contact the authorities about the fraud - a fraud in which he played no part. The sad irony is, of course, that up to that point he had done nothing legally wrong for which he had to in any way cover up, and it was only his desire to attempt to protect the financial affairs of others that now places him in jeopardy of losing everything. He decidedly did NOT make a decision that would, in any way, benefit him.

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[3] In contrast to Keith, Geringer and Luck took substantial salaries each month, sometimes, it appears, as much as $50,000. Luck seemingly viewed investor money as a personal piggy bank to, among other things, support his racing team (to the tune of approximately $3 million), which he continued to do even after learning of Geringer's false claims of investment success.

[4] The United States Sentencing Commission, in its proposed amendments to the Guidelines recently submitted to the Congress, suggests an expanded use of the mitigating role adjustment. April 15, 2015, proposed Amendment 5, page 33. www.ussc.gov/sites/default/files/pdf/amendment-process. Accessed May 10, 2015.

Keith's conduct since charges were filed underscores the quality of his character. He has continued to work to support his family, despite having to live thousands of miles from them. There is not a hint of impropriety in his current work, and, as the letter provided to the court by his employer attests, is a highly valued member of the organization. He is doing now what he consistently did before his involvement with Geringer and Luck. He is working hard, competently, and ethically. It is no small thing that he has also undertaken to accept the financial obligation of his own defense, despite the heavy burden that entails and the limits placed on it by his lack of resources.

No one can doubt that Keith Rode's history and characteristics indicate that he would be successful on probation supervision and would do his utmost to fulfill any conditions that Court may impose. Imprisonment is not necessary to reinforce his complete acceptance of responsibility and his commitment to live a transgression free life.

Need for the Sentence to Reflect Seriousness of Offense, Promote Respect for the Law, and Provide Just Punishment: The admonition of *Gall v. United States*, *supra* at 599, is appropriate here. Respect for the law is not always embodied in harsh sanctions. It is sometimes the case that an examination of all of the factors in a case results in the Court recognizing that a felony conviction and the restrictions imposed during a period of probation, fulfills the statutory requirements of sentencing. See, also, *United States v. Edwards*, *supra* at

1016.

There is no doubt that this overall offense is serious. It victimized many people and has resulted in significant losses and real harm to many people. However, Keith Rode's role in this offense is significantly mitigated. He had no role in creating this fraud and he benefitted little. He made a grave error when he went along with what he was lead to believe was a legitimate "plan" to make the investors whole, but did so with the genuine expectation that it would do just that. Like many, if not all of the individual investors, Keith also placed his own trust in those that we now know are untrustworthy. A sentence to probation, including the loss of his professional license[5], recognizes the reality of Keith Rode's role in this offense, promotes respect for the law and provides just punishment for his actions.

To Afford Adequate Deterrence: There is no doubt that Keith Rode has already been deterred from any future illegal conduct simply by this Indictment and the collateral consequences he has already suffered. For personal deterrence, it can be said that has already been accomplished.

With respect to general deterrence, the notoriety, loss of professional license, and conviction are strong messages to be sent to the community. The Court's compassion and understanding of the individual circumstances in this case will not only promote respect for the law, but will also send a message to any that contemplates violating the law, that their circumstances will be closely scrutinized and rogue behavior will be seen and punished.

To Protect the Public From Further Crimes of the Defendant: Any review of Keith Rode's background and his response to this prosecution results in the conclusion that Keith does not present any kind of a threat to the community or its hegemony. Imprisonment is not necessary to protect the community from Keith Rode. He has learned a valuable lesson.

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[5] Keith has voluntarily surrendered his license in California and has accepted the sanctions on his practice imposed as part of the SEC action associated with this case. He has been informed that there is no procedure to surrender his license in Wisconsin, but must wait for it to simply lapse, which he will do.

To Provide Needed Education or Treatment: Keith Rode is educated and capable. Although he will lose his CPA license, he has a well developed skill set and will be able to reorient his economic life in a positive direction. Treatment in a correctional setting is not only not necessary, as the Court can see from the comments of his present employer, would be counter productive.

V. CONCLUSION

Keith Rode recognizes that he is asking the Court to grant a significant variance and sentence him to five years probation, with special conditions that he serve a substantial period of home detention and make restitution. However, he asks the Court to consider his true role in this offense and that probation, home detention, loss of professional license and the obligation to repay investors, is the appropriate response to this case. Keith Rode did not initiate this fraud, nor did he intend to perpetuate it. He did not aggrandize himself in the process. He acted in good faith until he made the truly regretful decision to go along with the plan to try to recoup funds with which to make the investors whole.

Both *Gall* and *Edwards* anticipated circumstances such as Keith Rode presents to the Court. He is a truly good man who made a mistake in the interests of trying to do the *right* thing - recoup funds for investors. That decision put him in a position to participate in this offense. It is not characteristic of Keith Rode. It is truly aberrant in an otherwise laudable life.

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Respectfully submitted,

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